Petition

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STUART MISKOW, individually and as Executor of the Estate of PETER J. MISKOW, deceased, et al.,
Petitioners,

vs.

THE BOEING COMPANY, ROHR INDUSTRIES, INC., and THE McDONNELL DOUGLAS CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN CLIFTON ELSTEAD
Law Offices of
GERALD C. STERNS
490 Pacific Avenue
San Francisco, CA 94133
(415) 788-3900
Counsel of Record for Petitioners

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

(1) Whether, in a products liability action brought by foreign plaintiffs against American corporate defendants, it is an abuse of discretion for a federal trial court to dismiss the action on the grounds of *forum non conveniens* on the condition that another corporate entity (not before or subject to the trial court's jurisdiction) go to trial promptly in a foreign jurisdiction on the issue of damages without contesting liability?

(2) Whether, in such an action, it is an abuse of discretion to condition a *forum non conveniens* dismissal on acceptance of a foreign judgment against a foreign corporate entity (not before or subject to the trial court's jurisdiction) as full discharge of all persons' liability to the petitioners?

(3) Whether, under the guidelines established by this Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Company v. Reyno*, 50 L.W. 4055 (1981), the federal trial court abused its discretion in dismissing the petitioners' action on the grounds of *forum non conveniens*?

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OPINIONS BELOW

The Memorandum of the Court of Appeals, not yet reported, appears in Appendix A. The Order redesignating the Memorandum for publication appears in Appendix B. The Memorandum of Decision and Order of Dismissal of the trial court, not reported, appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1981. This petition was timely filed within ninety days of that date. This Court's jurisdiction is involved under 28 U.S.C. 1254(1).

STATEMENT

I

The case arises out of the crash of a Boeing 737 commercial jet airliner[1] in Cranbrook, British Columbia, Canada, on February 11, 1978, a crash which the petitioners allege was caused by defective thrust reversers on the airliner. E.R. 1-12.[2] The airliner was manufactured in the United States and owned and operated at the time of the crash by Pacific Western Airlines (PWA), a Canadian airline not before or subject to the jurisdiction of the trial court in this case. E.R. 1-12, 71-77, 84, 92.

The following facts surrounding the crash highlight the merits of a products liability action against the respondents, wherever that action might eventually be prosecuted: The crash occurred at noontime during a snowstorm and while a go-around from an approach to a landing at the Cranbrook Airport was being attempted. E.R. 174-186. The airliner had completed its initial approach and had just touched down on the end of the runway when the pilot spotted a snowsweeper approximately three quarters of the way down the relatively short 6,000′ runway. *Id.* The pilot concluded that he could not stop the airliner short of the snowsweeper and decided to get airborne again and come back for a landing when the runway was clear. *Id.* This maneuver, known as a go-around, was well

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[1]This is the same model airliner that recently crashed during takeoff in a snowstorm from the National Airport in Washington, D.C.

[2]"E.R." refers to the Excerpt of Record transmitted to the Court of Appeals.

within the performance capabilities of the Boeing 737 and is a maneuver regularly accomplished by all commercial airliners. E.R. 188-189.

At touchdown and before spotting the snowsweeper, the pilot initiated extension of the thrust reversers so that he could safely stop the airliner on the snow-covered runway E.R. 174-186, 74-75, 197. The thrust reversers are large metal plates which, when activated, pop out from the sides of each of the airliner's two engines (which are mounted on pylons hanging down from the wings) and divert or reverse engine thrust forward, thereby increasing runway braking action. *Id.*, 316. They are activated by retarding the two throttles for the engines to the "IDLE" power position and then bringing them around a detent on the throttle quadrant and advancing them forward to produce engine thrust, thrust which is now diverted forward to slow the airliner down on the runway. They are retracted by retarding the throttles back to the "IDLE" power position and bringing them back around the detent to the normal side for producing thrust for flight. The movement around the detent activates the hydraulics for the thrust reversers and either extends or stows them, depending upon which way around the detent the throttles are moved. *Id.*

Upon deciding to go-around for another landing, the pilot brought the throttles back around the detent to stow the thrust reversers, added full power to the engines, and took-off again. E.R. 174-186. This was accomplished without difficulty. However, as the airliner passed over the snowsweeper, at an altitude in excess of 200′, the thrust reverser on the left engine suddenly and unexpectedly

popped out. E.R. 184, 469. The thrust reverser on the right engine remained stowed. *Id.* This caused an asymmetrical aerodynamic and thrust condition that the pilot could not control. Consequently, the airliner rolled out of control to the left and cartwheeled into the ground and exploded. E.R. 174-186, 197.

The asymmetrical aerodynamic condition was caused by the drag effect of the left thrust reverser sticking out into the airstream while the right one remained stowed. *Id.*[3] The asymmetrical thrust condition was caused by the left engine going to the "IDLE" power position while the right engine was producing maximum take-off power. *Id.* When the left thrust reverser popped out, it automatically slammed the left throttle to the "IDLE" power position, breaking the pilot's thumb. E.R. 182 There was nothing that the pilot could do to stop this from happening or to readvance the throttle to produce thrust for flight. E.R. 174-186, 196-198[4]

The Aviation Safety Investigation Division, Aviation Safety Bureau, of Transport Canada (the equivalent of our NTSB) spent over a year investigating the crash. At the conclusion of its investigation, it reported several

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[3]This operated like a big speed brake which pulled the aircraft to the left, just as a car would be pulled to the left if the left brake jammed on while driving on an icy road.

[4]The only thing the pilot could have done was to bring the left throttle around the detent to the reverse thrust position, but this would have produced reverse thrust and only aggravated an already hopeless situation.

findings (E.R. 174-186), among them being that the pilot lost control as a result of the left thrust reverser popping out and that our FAA's design standards for the Boeing 737 thrust reversers are inadequate. It also found that the snowsweeper was still on the runway due to miscommunications between the airport tower, air traffic control, and the airliner. These miscommunications, however, do not explain why the left thrust reverser popped out and caused the airliner to crash. This explanation can only be assembled during a products liability action against the respondent manufacturers of the airliner and its thrust reversers.

II

The petitioners are citizens of Canada and either lost a relative in the crash or were injured in it themselves as a passenger. They subsequently filed actions for wrongful death and personal injury in the United States District Court for the Central District of California. The respondents are corporate citizens of the United States and jurisdiction was based on diversity of citizenship. The respondent Boeing designed and manufactured the Boeing 737 in the State of Washington (E.R. 71-77) and subcontracted the design and manufacture of the thrust reversers to the respondent Rohr in California (*Id.*, 187-194).

In their actions, the petitioners asserted both strict liability and negligence as grounds for recovery. They filed their actions in California because Canadian law is inadequate in the area of products liability and discovery to fairly allow a successful products liability action against

large American manufacturers.[5] They also filed in California because California damages laws are more liberal than Canadian and would, therefore, more appropriately deter the future manufacture of defective Boeing 737's.

Shortly after filing and before any discovery had commenced, the respondents moved to dismiss the actions on the grounds of *forum non conveniens*. E.R. 15-17. After extensive briefing and oral argument, the district court dismissed the actions on April 23, 1979, subject to the following conditions (spelled out in its Memorandum of Decision and Order of Dismissal):[6]

(1) that the respondents submit to jurisdiction in Canada and waive any statutory limitations there (E.R. 477);

(2) that PWA go to trial promptly in Canada on the issue of damages without contesting liability (E.R. 477);

(3) that the judgment against PWA constitute full discharge of all persons' liability to the petitioners (E.R. 477-478); and

(4) that if any of these conditions are not observed, the petitioners shall have the right to move to reinstate their actions in the district court (E.R. 478).

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[5]Canadian law does not recognize strict liability in tort and its discovery laws offer no sanctions for non-discovery. E.R. 228-238, 459-467.

[6]The trial judge signed the Memorandum on April 23, 1979. E.R. 478. It was filed and entered on April 26, 1979. E.R. 468.

The district court cited *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and based its decision on the following conclusions: (1) a coroner's inquest determined that the cause of the crash was pilot error and faulty air traffic control communication (E.R. 469-470); (2) nearly all of the evidence regarding the crash is in Canada (E.R. 472-473); (3) PWA, the Canadian government, and Boeing have an agreement to negotiate settlements in Canada and not contest liability (E.R. 470-471);[7] (4) PWA is not subject to the court's jurisdiction in California whereas the respondents are, or can be made subject to jurisdiction in Canadian courts (E.R. 473); and (5) trial in an American court would be an unnecessary burden. (E.R. 474).

III

The Court of Appeals affirmed the dismissal, citing its reasons for doing so in a Memorandum filed October 28, 1981. Appendix A. The Memorandum was redesignated an opinion for publication on November 30, 1981 (Appendix B), however, it has not yet been published.

The Court of Appeals began with the premise that the standard to be applied on consideration of a *forum non conveniens* motion is whether the defendants have made a "clear showing" that the plaintiffs' choice of forum:

> "either: '(1) establish[es] such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affect-

[7]The only proof of this agreement was the oral representation by counsel for Boeing.

> ing the court's own administrative and legal problems.'" [citing *Hoffman v. Goberman* (3rd Cir. 1970) 420 F.2d 423, 426-427].

Appendix A, page 5.

The Court of Appeals emphasized the following matters and, applying the above standard, affirmed the dismissal:

(1) A coroner's jury assigned pilot error and inadequate air traffic control communication as the cause of the crash (Appendix A, page 2);

(2) PWA, Boeing, the Canadian government, and the City of Cranbrook have an agreement authorizing PWA to negotiate settlements of all passenger claims (Appendix A, page 2); and

(3) A weighing of the private and public factors stated in *Gulf Oil Corporation, supra,* by the district court and its dismissal of the actions was not an abuse of discretion (Appendix A, pages 4-5).

The Court of Appeals declined to decide whether it was an abuse of discretion to dismiss the actions rather than to transfer them, under 28 U.S.C. 1404(a), to the State of Washington, Boeing's principal place of business. Appendix A, page 4. It also declined to consider the questions pertaining to the power of the trial court to impose the conditions it did as part of its dismissal. Appendix A.

ARGUMENT

I

Ever since *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501 (1947) and *Koster v. Lumbermen's Mut. Cas. Co.,* 330 U.S.

518 (1947), controversy has raged between proponents of plaintiffs' and defendants' points of view over the scope and meaning of the *forum non conveniens* doctrine. This controversy has been fueled by lower court decisions which, depending upon their factual focus, vacillate between the two points of view. *Tivoli Realty v. Interstate Circuit* (5th Cir. 1948) 167 F.2d 155, for example, focused on the domicile of the defendant, while *Fitzgerald v. Westland Marine Corp.* (2d Cir. 1966) 639 F.2d 499 focused on the location of the injury and acts complained of. As a result, cases with similar factual patterns may be dismissed in one federal district and retained in another.

This vacillation is to be expected to some degree due to the wide discretion given a trial court faced with a *forum non conveniens* determination. However, such wide discretion does not make a trial court's determination inviolate nor does it mean that guidance from this Court is moot. *Piper Aircraft Company v. Reyno,* 50 L.W. 4055 (1981), notwithstanding, there remain unresolved key questions which, with increasing regularity, arise in *forum non conveniens* determinations, such as the conditioning power of the trial court. *Reyno,* the Court's most recent decision on *forum non conveniens,* resolved several questions which, since *Gilbert,* have plagued this area of the law. However, it did not resolve the question of a trial court's power to condition a dismissal, beyond conditions pertaining to submission to jurisdiction and waiver of statute of limitations.

These questions typically arise in cases where the dispute is between foreign citizens and American corporate citizens.

They also typically invite resolution through one or both of two different perspectives: choice of law and/or *forum non conveniens*. As to the former perspective, many states apply their own law to their own defendant residents, regardless of where the injury produced by their wrong manifests itself. See California, *Hurtado v. Superior Court* (1947) 11 C.3d 574. The theory is that resident tortfeasors should be deterred from committing wrongful acts within their home state by the application or "sting" of their own law. *Id.* at 584. This theory has special significance in a products liability action where a defectively designed or manufactured product can just as easily cause injury within the borders of the home jurisdiction as without.

What most states have not done, and what federal jurisdictions have also not done, is to work out a fair and equitable apportionment between the two perspectives. Such an apportionment should derive from a rule which prevents *forum non conveniens* from being used as a means of indiscriminate "reverse forum-shopping" and avoidance of otherwise applicable law. *Reyno, supra,* at 4060, n. 19. The expectations at manufacture as to applicable law should be fairly considered and, in many instances, might well merit a *forum non conveniens* dismissal only on condition that the moving party accept application of its own law in the foreign jurisdiction. At the very least, they should merit a balancing of choice of law factors on a par with other factors considered in a *forum non conveniens* determination.

II

Reyno resolved some of the questions that regularly arise in this type of case (such as the weight to be given choice

of law considerations and the citizenship of the plaintiff), however, it left unresolved the extent of a trial court's power to condition a *forum non conveniens* dismissal. It is this "conditioning" power that the petitioners primarily seek resolution of, not only for their sake but for that of future litigants. They submit that their case is the best case for this resolution, the reason being that, unlike *Reyno* where there was "no evidence of defective equipment" (50 L.W. at 4050), there is such evidence in their case and strong evidence at that. In addition, their case has all the classic ingredients of a products liability dispute between foreign citizens and American citizens, not to mention a record out of the trial court showing an abuse of discretion, not only as to the conditions it imposed but also as to the traditional balancing analysis it made. The trial court expressly rejected all claims of products liability, despite clear proof of such liability.

The petitioners recognize that, in almost all instances, convenience to one party will mean inconvenience to another. However, they question how a corporate defendant with national and international operations can be inconvenienced by being sued in its home court, particularly in a commercial airliner case where it is insured by an international insurance conglomerate (such as Lloyds of London) that chooses counsel to represent the manufacturer, controls all decisions in the litigation, and pays the costs for and any damages incurred as a result of the litigation.

In an effort to reduce the amount they will have to pay for their insured's wrongful acts, these insurance conglomerates typically volunteer to be sued in a jurisdiction

foreign to their insureds, where law and procedures are less consumer oriented and, therefore, more favorable to them. While all forms of such "reverse forum-shopping" should not "ordinarily" enter into a trial court's *forum non conveniens* analysis, it is submitted that it should be in cases like this one where inconvenience is really a spurious claim by the defendant, designed to mask what is really a choice of law goal. Otherwise, it will remain profitable for those insurance conglomerates to broker American lives against the likelihood of escaping this Country's laws.

III

Under present law, the trial court did not go astray when it conditioned the dismissal on the respondents' submission to jurisdiction in Canada and their waiver of any statutes of limitations there. Similar conditions were imposed by the trial court in *Reyno* and implicitly approved by this Court's reversal in that case. However, as previously indicated, the trial court in this case went far beyond those recognized conditions and included additional conditions in its dismissal which are novel in this type of case and which far exceed the power of the court to impose. As such, the dismissal and published affirmance by the Court of Appeals will set an unacceptable precedent, absent review by this Court.

These additional conditions were imposed after representations by Boeing that Boeing had made an agreement with PWA and other Canadian entities to settle or go to trial in Canada on the issue of damages without contesting liability. However, no actual proof of this agreement was offered and, as might be expected, settlement and damages

trials for the petitioners have not occurred.[8] Furthermore, Rohr, the manufacturer of the thrust reversers, never represented that it was or even intended to become a party to the alleged settlement agreement.[9] The dismissal as to Rohr is therefore tantamount to a summary judgment dismissal. It has no involvement in the so-called settlement agreement, and due to the imposed condition that judgment against PWA constitute full discharge of all liability, it is insulated from judgment in Canada as well as in America.

The petitioners can find no law authorizing a *forum non conveniens* dismissal on such sweeping conditions. The trial court has no power to enforce the absent person or entity to perform the described acts, nor do the parties requesting the dismissal have such power, regardless of any agreement one of them may claim to have with the absent person or entity. The matter is, for all practical purposes, up for grabs. This makes a mockery of the balancing consideration which, under the rule of *Gilbert*, the trial court was mandated to make. Theoretically, the conditions requiring submission to foreign jurisdiction and waiver of foreign statutes of limitations assume the right of plaintiffs not to be barred from their lawsuits as a result of a dismissal. Otherwise, the imposition of such con-

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[8]Subsequent to the dismissal, PWA fired its Canadian counsel and retained California counsel in San Francisco to represent its interests. Apparently the issue of liability has crept back into the Canadian proceedings, thereby thwarting the design of the trial court's conditional dismissal.

[9]Apparently Rohr's reluctance to contribute any settlement monies in Canada is one of the reasons for Rohr's retention of California counsel.

ditions would be a meaningless act. Here, however, that assumption is defeated by those other conditions which the trial court did not have the power to make.

IV

Obviously, the conditions at issue are the *sine qua non* of this Petition. However, the petitioners also submit that it was an abuse of discretion for the trial court to accept the representations of the respondents as to their lack of liability. In doing so, the trial court, in effect, tried the petitioners' case prior to the time that they had had any opportunity to discover or obtain evidence to make a *prima facie* jury showing. This is highly prejudicial in a products liability case where the manufacturer holds all the evidence and disgorges it only after substantial discovery.

At the insistence of the respondents, the trial court accepted the findings of a local coroner's jury as to the causes of the crash, despite insistence by the petitioners that coroner's juries in Canada have no more expertise to make such findings than do coroner's juries in the United States. The effect was to restructure the petitioners' case along the lines most favorable to the respondents. This made the required *Gilbert* analyses a foregone conclusion in favor of the respondents.

The result is one of substance rather than convenience, the reason being that products liability and discovery law in Canada offers no chance of success in a complicated trial against a large American manufacturer. As previously indicated, there is no strict liability in tort or "stream of

commerce" law in Canada. E.R. 228-238. Furthermore, there are no Canadian rules for sanctions (such as our F.R.C.P. 34) for failure to make discovery and without such rules adequate discovery is impossible. E.R. 459-467. *Forum non conveniens* was never intended to preclude a lawsuit, as it does here, but merely to shift it to a more convenient forum.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that their Petition for a Writ of Certiorari be granted and that the dismissal of their actions be reversed.

Dated: January 22, 1982

Respectfully submitted,
JOHN CLIFTON ELSTEAD
Counsel of Record for Petitioners

(Appendices Follow)

Appendix

APPENDIX A

In the United States Court of Appeals
for the Ninth Circuit

No. 79-3404
D.C.# CV-79-526 MRP

Stuart Miskow, individually and as executor of the estate of Peter J. Miskow, deceased on behalf of the estate and heirs of said decedent, et al.,
Plaintiffs-Appellants,

vs.

The Boeing Company, a corporation, McDonnell Douglas Corporation, a corporation, and Rohr Industries, Inc., a corporation,
Defendants-Appellees.

[Filed October 28, 1981]

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
District Judge Mariana R. Pfaelzer, Presiding
[Submitted September 10, 1981]

Before: WRIGHT and WALLACE, Circuit Judges, and CARROLL, District Judge.*

This appeal involves an airplane crash in Cranbrook, British Columbia. The issue is whether the District Court for the Central District of California properly dismissed for *forum non conveniens* suits for wrongful death resulting from the accident.

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*Of the District of Arizona.

FACTS

On February 11, 1978, a Boeing 737 operated by Pacific Western Airlines, Ltd. (PWA) of Canada attempted to land at the Cranbrook airport in a snowstorm.

As the airplane landed, the pilot saw snow removal equipment still on the runway. He applied forward thrust in an apparent attempt to make a "go-around" to land again. But after reaching an altitude of approximately 200 feet, the airplane banked sharply to the left and crashed. Forty-three persons were killed and six were injured. All passengers and crew were Canadian citizens.

A coroner's jury determined that inadequate communication between Calgary Air Traffic Control, Cranbrook Aeradio, and the aircraft, as well as the pilot's decision to abort the landing and attempt a go-around were "contributing factors" to the cause of the crash. Because of the failure of communication, Cranbrook controllers were unaware that the airplane was arriving ten minutes early and the snow machinery was not alerted to move from the runway. The jury found also that the pilot's attempted maneuver was contrary to a caution issued to PWA pilots that initiation of the thrust reverser sequence could prevent a successful go-around. It further found that the failure of a thrust reverser on the No. 1 engine to stow during this maneuver caused the aircraft to bank sharply to the left and crash.

After the accident, PWA, Boeing, the Canadian government, and the city of Cranbrook, entered an agreement authorizing PWA to negotiate settlement of all passenger claims, leaving the ultimate allocation of responsibility for

later resolution. PWA wrote to counsel for each passenger, offering to negotiate a settlement or to stipulate to liability and try the damage issues in Canada. Between June and August of 1978, approximately 30 actions were filed in British Columbia against the several defendants, including PWA, the Canadian government, the city of Cranbrook, Boeing, and Rohr.

In February 1979, the appellants filed suit in the district court for the Central District of California against Boeing, Rohr, and McDonnell Douglas.[1] They alleged that defects

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[1]Appeal from the district court's dismissal was originally brought by the following parties, individually and as executors of the estates of persons killed in the crash:

1. Glenda R. Orr, Shonna L. Rosse, Verla C. Nickerson
2. Thomas Sprague
3. Stuart Miskow
4. Peter Thiessen
5. Frank A. Urban
6. Grant F. R. Thompson
7. Niels E. Knudsen
8. Mary A. Martin
9. Patrick M. Gilmartin
10. Olav. H. Juel
11. Miriam L. Riddell
12. William Henderson
13. Jacquelin L. Hemmelgarn
14. Scott C. Watson
15. Maria G. Giuriato, Cirillo Giuriato
16. Ronald Sims, Cherry N. Sims
17. Jamis K. MacFarlane
18. Douglas G. Howard

All but five of these parties have settled and by stipulation are out of this action. Our judgment applies only to plaintiff-appellants Stuart Miskow, Peter Thiessen, Niels Knudsen, Patrick M. Gilmartin, and Scott C. Watson.

in appellees' thrust reverser system caused the crash. These actions were filed four days after the California Superior Court in San Diego ordered a *forum non conveniens* dismissal of similar actions brought by some of the appellants against Boeing, Rohr, and PWA. The district court also dismissed for *forum non conveniens.*[2]

DISCUSSION

The common law doctrine of *forum non conveniens* is applied to the federal courts by the 1947 Supreme Court decisions of *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) and *Koster v. Lumbermens Mutual Co.,* 330 U.S. 518 (1947). These cases essentially prescribe a weighing of "private" and "public" factors to determine where, as between the forum of present jurisdiction and another, the action would more properly be heard. The court warned that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.,* 330 U.S. at 508. Yet it recognized that the doctrine left "much to the discretion of the court to which the plaintiff resorts." *Id.*

The doctrine of *forum non conveniens* in the federal courts was partly displaced with the passage of 28 U.S.C. § 1404, which requires transfer instead of dismissal if the cause can be heard in a more convenient district or division.

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[2]Because our disposition reaches the same result arrived at by the state court, we need not decide whether *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) would compel us to apply state *forum non conveniens* law. If we were in doubt, the plaintiff-appellants would have a difficult burden to convince this court that it should not follow the state court's determination.

We have recognized, however, that this section was not meant to displace entirely the common law doctrine. When the action should have been brought abroad instead of in the United States, the common law doctrine is to be applied. *Yerostathis v. A. Luisi, Ltd.*, 380 F.2d 377, 379 (9th Cir. 1967); *Paper Operations Consult. Int., Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975).

We determine only whether the district court abused its discretion in dismissing this action instead of transferring it to another district or division. To make this determination we inquire only whether the court properly weighed the "factors" enumerated in *Gulf Oil Corp., supra,* and recognized in this circuit by *Paper Operations Consult., supra.* We are convinced that it did.

In *Gulf Oil Corp.*, 330 U.S. at 508-09, the Supreme Court listed these factors for consideration:

1. Private interests
   a. relative ease of access to sources of proof
   b. availability of compulsory process for attendance of unwilling witnesses
   c. cost of obtaining attendance of willing witnesses
   d. possibility of view of premises
   e. enforceability of judgment
   f. relative advantages and obstacles to fair trial
2. Public interests
   a. administrative difficulties from congestion when litigation is not handled at its origin
   b. imposition of jury duty on people of a community which has no relation to the litigation

c. local interest in having localized controversies decided at home

d. having diversity cases tried in a forum that is at home with the law that must govern the case.

We have recognized that these factors are not exclusive and that some weigh more heavily in a court's determination than others. *Paper Operations*, 513 F.2d at 670-72 and n.11. Weighing these factors, a district court may decide that transfer to another district or division will not significantly alleviate the burden that retention of jurisdiction would impose on private and public interests and that dismissal is appropriate.

The standard to be applied is whether, in light of these factors, defendants have made a "clear showing" that either: "(1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* at 670 (quoting *Hoffman v. Goberman*, 420 F.2d 423, 426-27 (3d Cir. 1970)).

We have reviewed the record and, applying the above standard, hold that the district court's dismissal of this action for *forum non conveniens* conditioned upon defendants' submitting to Canadian jurisdiction was within its discretion.

AFFIRMED.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

No. 79-3404

Stuart Miskow, individually and as executor of the estate of Peter J. Miskow, deceased on behalf of the estate and heirs of said decedent, et al.,
Plaintiffs-Appellants,

vs.

The Boeing Company, a corporation, McDonnell Douglas Corporation, a corporation, and Rohr Industries, Inc., a corporation,
Defendants-Appellees.

[Filed November 30, 1981]

ORDER

Before: WRIGHT and WALLACE, Circuit Judges and CARROLL,* District Judge

The memorandum disposition filed October 28, 1981 is hereby redesignated an opinion for publication showing Judge Wright as author.

BY ORDER OF THE COURT:
CHRISTOPHER W. VASIL
Christopher W. Vasil
Acting Clerk of Court

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*The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

United States District Court
Central District of California

Case Number
CV 79-526, 79-527, 79-528, 79-529, 79-530, 79-531, 79-532, 79-533, 79-534, 79-536, 79-537, 79-538, 79-539, 79-540, 79-541, 79-542, 79-543, 79-583 MRP

Glenda Raye Orr, et al.,
Plaintiffs,

vs.

The Boeing Company, et al.,
Defendants.

[Filed April 25, 1979]

MEMORANDUM OF DECISION AND ORDER OF DISMISSAL

Defendant the Boeing Company ("Boeing") has moved to dismiss the complaints in eighteen related wrongful death and personal injury actions, all arising from the same accident on the ground of *forum non conveniens*. Defendants Rohr Industries, Inc. ("Rohr"), and McDonnell Douglas Corporation ("McDonnell Douglas") have joined in the motions. Extensive memoranda and affidavits were filed by all parties and have been considered by the Court. On April 9 and April 16, 1979, this Court heard oral argument on the motions and subsequently took the matter under submission.

FACTS

On February 11, 1978, a Boeing 737 operated by Pacific Western Airlines, Ltd. ("PWA"), a Canadian airline, crashed while en route from Calgary, Alberta, to Cranbrook, British Columbia. The accident occurred when the aircraft attempted to land at the Cranbrook Airport during a snowstorm while the City of Cranbrook's snow removal equipment was still on the runway.

When the pilot saw the snowplow in the runway, he applied forward thrust in an apparent attempt to execute a "go-around" to land again. The aircraft ultimately attained an altitude in excess of two hundred feet and then banked sharply to the left, crashing near the end of the runway. Forty-three people were killed and six were injured. All of the passengers and crew aboard the aircraft were Canadian citizens. Both the Calgary and Cranbrook communication stations were operated by employees of the Government of Canada.

Pursuant to the law of British Columbia, a Coroner's inquest was convened on May 8, 1978, to determine the cause of the crash. After receiving six days of testimony and evidence, the Coroner's jury concluded that inadequate communication between Calgary Air Traffic Control, Cranbrook Aeradio and the aircraft, and the pilot's decision to abort the landing and attempt a "go-around," were "contributing factors" to the cause of the crash. *See* Report of Coroner's Inquisition. The jury found that the inadequacy of communication was evidenced by the failure of Calgary Air Traffic to calculate a reasonably accurate Estimated Time of Arrival ("E.T.A."), the failure of the flight crew to effec-

tively communicate to Cranbrook Aeradio an accurate E.T.A., the failure of Cranbrook Aeradio to ask the pilot for an updated E.T.A., and the failure of the pilot to ascertain whether or not the snow removal equipment had left the runway. The jury further found that the pilot's decision to attempt a "go-around" was contrary to a caution issued to PWA pilots, and that the failure of a thrust reverser[1] on the No. 1 engine to stow during this maneuver caused the aircraft to bank sharply to the left and crash.

Following the accident, PWA, Boeing, the Government of Canada, and the City of Cranbrook, entered into an agreement authorizing PWA to negotiate settlements of all passenger claims, leaving the ultimate allocation of responsibility for later resolution. In accordance with their arrangement, PWA wrote to counsel for each of the passengers, offering to negotiate a settlement or to stipulate to liability and to try the issue of damages in Canada if a negotiated settlement could not be reached. Between June and August of 1978, approximately thirty-one actions were filed in British Columbia against various defendants, including PWA, the Government of Canada, the City of Cranbrook, Boeing, and Rohr.

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[1]The Boeing 737 aircraft involved in the accident is powered by two jet engines, one mounted under each wing. A "thrust reverser" system is attached to the rear of each engine to decelerate the aircraft during a landing. The thrust reverser consists of two metal deflector doors, semicylindrical in shape, which when closed ("stowed") form a full cylinder surrounding the jet engine exhaust. When the two doors are rotated rearward to a deployed position behind the engine exhaust, the doors act to block the exhaust gas and divert it in a forward direction, thereby causing the aircraft to decelerate.

On February 9, 1979, plaintiffs filed the present actions in this court against Boeing, Rohr and McDonnell Douglas alleging, *inter alia,* that defects in the defendants' thrust reverser system caused the crash. These actions were filed four days after the Superior Court of the State of California for the County of San Diego ordered a *forum non conveniens* dismissal of similar actions brought by five of the plaintiffs herein against Boeing, Rohr, and PWA. The Court's jurisdiction is properly invoked on the basis of diversity of citizenship. 28 U.S.C. § 1332.

THE APPLICABLE LAW

Under the principle of *forum non conveniens,* a court may resist the imposition of jurisdiction, even if jurisdiction is authorized by a general venue statute. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947). In cases where the more convenient forum is within the United States, the doctrine has been supplanted by the provisions of 28 U.S.C. § 1404(a). However, the doctrine of *forum non conveniens* is applicable in cases which should have been brought in a foreign jurisdiction. *Yerostathis v. A. Luisi, Ltd.,* 380 F.2d 377, 379 (9th Cir. 1967).

The factors which the Court must consider in determining whether to grant defendants' motions are set forth in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947). The relevant private factors include the accessibility of the sources of proof, the availability of compulsory process over unwilling witnesses, the cost of obtaining the attendance of willing witnesses "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. There are also public interest considerations, in-

cluding the administrative burden on a forum which has minimal contact with the controversy, the necessity of the application of foreign law by such forum and the interest which another forum may have in the controversy. *Id.* at 508-09.

As the Court in *Gulf Oil* cautioned, the plaintiff's choice of forum should not be disturbed, "unless the balance is strongly in favor of the defendant." 330 U.S. at 508.

An alternative formulation of the standard for determining whether an action should be dismissed on the ground of *forum non conveniens* was approved by the Ninth Circuit in *Paper Operations Consultants Int'l., Ltd. v. SS Hong Kong Amber,* 513 F.2d 667, 670 (9th Cir. 1975):

> There must be a clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of all proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

In applying the above standard, the Court weighed the factors enumerated in *Gulf Oil.* The Court stressed that the two tests were not mutually exclusive, so that some combination of private and public factors together might justify a *forum non conveniens* dismissal. 513 F.2d at 672 n.11. Thus, the Ninth Circuit view appears to be in harmony with the balancing test applied in the *Gulf Oil* case.

In this case, a balancing of the relevant factors weighs heavily in favor of dismissal of these actions. One of the most important of the *Gulf Oil* factors is the relative avail-

ability of the evidence and witnesses. Here, nearly all of the evidence regarding the cause of the crash, including information from the employees and records of PWA, the City of Cranbrook, the air traffic services of the Government of Canada, various eyewitnesses, and the official investigators, as well as the wreckage of the aircraft, and the radio tapes, is located in Canada. In addition, since all of the plaintiffs and the decedents lived and worked in Canada, most, if not all, of the evidence with respect to plaintiffs' damages will be found in Canada.

Another of the *Gulf Oil* factors emphasized by many courts is the relative availability of compulsory process. Here, it is clear that numerous key Canadian witnesses would not be subject to the compulsory process of this Court.

A third factor weighing in favor of the Canadian forum is that the Canadian court can obtain jurisdiction over all parties to determine all issues arising from the accident. Boeing, Rohr, and McDonnell Douglas all have agreed to submit to Canadian jurisdiction. On the other hand, three key parties, PWA, the Government of Canada, and the City of Cranbrook, do not appear to be subject to this Court's jurisdiction. Absent these parties, this Court's ability to render complete justice to the remaining defendants is seriously prejudiced. *See Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

Several other practical considerations militate in favor of the Canadian forum, including the cost of obtaining Canadian witnesses to testify or to have their depositions

taken, and the unavailability of a view of the scene of the accident by the trier of fact if the actions are tried in California, as actions are allowed to proceed to trial at the same time as those already begun in Canada.

In addition to the "private" factors which would be prejudicial to defendants, various "public" factors weigh against a choice of this forum. Because this forum has only the most minimal contact with the controversy, if indeed it has any, trial in this jurisdiction would impose unnecessary burdens upon this Court. Conversely, the Canadian courts have a dominant interest in compensating local claimants and in assessing the responsibility of resident tortfeasors with respect to this accident. This interest is particularly strong because most of the alleged tortfeasors are Canadian governmental entities (PWA is owned by the Province of Alberta), and there is a public interest in having cases which involve a number of Canadian public entities decided in that jurisdiction.

Against this seemingly overwhelming array of factors which weigh in favor of dismissal, plaintiffs essentially make three arguments. First, plaintiffs contend that the accident was, in part, caused by a defective thrust reverser deflector door, manufactured and designed by Rohr, a San Diego-based corporation, and McDonnell Douglas, a corporation doing business in California. However, affidavits filed in support of this motion indicate that the deployment of the thrust reverser during the accident was the result of the Boeing hydraulic control system rather

than the Rohr thrust reverser hardware.[2] Plaintiffs' own exhibit tends to support this explanation. The Government of Canada's investigation report, relied upon by plaintiffs, fails to evidence any causal relationship between the hardware manufactured and designed by Rohr and the accident.[3] Thus, plaintiffs' assertion that Rohr was responsible for the accident would seem to be questionable. Whatever the weakness of the case against Rohr may be, the allegation that McDonnell Douglas is liable for the crash appears to be pure speculation. The only connection of McDonnell Douglas to the subject matter of the controversy is that Rohr developed a thrust reverser, which plaintiffs claim is superior to the thrust reverser used by Boeing, while under contract to McDonnell Douglas.

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[2]The hydraulic control system is designed to supply hydraulic pressure to the thrust reversers only while the aircraft landing gear is on the ground. When the aircraft landing gear leaves the ground, a "squat switch" automatically interrupts the flow of hydraulic pressure. If this occurs before the doors are stowed, as apparently happened here, the doors may then blow open and one of the thrust reversers could move to the deployed position. Boeing's flight tests and simulator analyses further indicated that the aircraft should have been controllable even with one reverser deployed if the pilot had followed normal go-around procedures and had not made an improper left rudder input. Instead, the pilot apparently applied left rudder pressure which started a yaw and roll to the left before applying corrective right rudder pressure. Transport Canada Report # H8001, §§ 1.16.2, 2.5.

[3]Plaintiffs claim that the aircraft involved in the accident did not have a squat switch. However, the Transport Canada investigation report indicates that there was such a squat switch on the aircraft. *See* § 1.17.2. Plaintiffs also argue that a "structural failure" in the Rohr thrust reverser hardware "may have equally caused" the accident. However, neither the Boeing experts nor any of the Canadian investigators who examined the thrust reverser hardware at the accident site found any evidence of structural failure.

Plaintiffs next contend that, under *Hurtado v. Superior Court,* 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), California's interest in deterring wrongful acts within its borders is so strong that this court should retain jurisdiction and apply the California law of damages. Plaintiffs argue that since Rohr manufactured the allegedly defective thrust reverser in California, this state has a sufficient interest to apply its own law. However, in *Hurtado, all* of defendants' wrongful conduct and the resulting effect on plaintiffs was in California. Here, even assuming Rohr were liable, its conduct would account for only a small part of the total liability for the accident and had absolutely no effect on California or its residents. Contrary to plaintiffs contention, *Hurtado* cannot be stretched to reach this set of facts.

Plaintiffs' final contention is that pretrial discovery in British Columbia is so limited in comparison to discovery in the federal courts of the United States that dismissal of these actions will result in manifest injustice to plaintiffs. The affidavits submitted by the parties on this point establish that although there are some differences between the discovery available in this forum and in the Canadian state court, the plaintiffs' contention has little merit.

One further condition for granting a *forum non conveniens* dismissal is that there be an alternative forum in which the action can be brought. *Paper Operations Consultants Int'l. Ltd. v. SS Hong Kong Amber,* 513 F.2d 667, 672-73 (9th Cir. 1975). Plaintiffs express some doubt as to whether a Canadian court could assert jurisdiction over defendants. However, defendants represent that they are

willing to submit to Canadian jurisdiction as a condition of dismissal. Several courts have conditioned *forum non conveniens* dismissals on the submission of the defendants to the jurisdiction of the foreign court where such jurisdiction might be otherwise uncertain. Some have added the further condition that, if the foreign court refused jurisdiction, plaintiffs could move the court to restore their action, and that defendants must waive any statute of limitations defenses in the foreign forum. *See Paper Operations Consultants supra,* at 672; *Schertenleib v. Traum,* 589 F.2d 1156, 1166 (2d Cir. 1978); *Fitzgerald v. Texaco, Inc.,* 513 F.2d 448, 449 (2d Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976). The approach taken in these cases adequately assures the availability of an alternative forum for plaintiffs.

IT IS THEREFORE ORDERED that these related actions are dismissed as to all defendants subject to the following conditions, which have been approved as to form by all parties:

a. That Boeing, McDonnell Douglas, and Rohr consent to the jurisdiction of the British Columbia courts of general jurisdiction in any actions filed by plaintiffs;

b. That Boeing, McDonnell Douglas, and Rohr will not raise any statute of limitations defense against plaintiffs if they file their actions in the British Columbia courts of general jurisdiction prior to February 11, 1980;

c. That PWA will go to trial promptly in the British Columbia courts of general jurisdiction on the issue of damages without contesting liability, and that the judgment against PWA and payment thereof shall constitute a full

discharge of all persons' liability to the plaintiffs, including but not limited to PWA, Boeing, McDonnell Douglas, Rohr, the City of Cranbrook, the Canadian federal government, and all of their employees, servants and agents;

d. That if any of the above conditions are not observed by Boeing, McDonnell Douglas, Rohr, or PWA, plaintiffs shall have the right to move to reinstate this action in the Central District of California, provided such motion for reinstatement is filed within six months of the alleged violation of any of these conditions.

Dated: April 23, 1979

MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

Opposition

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No. 81-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STUART MISKOW, individually and as Executor of the Estate of Peter J. Miskow, deceased, et al.,

Petitioners,

v.

THE BOEING COMPANY, ROHR INDUSTRIES, INC. and THE McDONNELL DOUGLAS CORPORATION,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BOEING'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. McLAUGHLIN
PERKINS, COIE, STONE,
OLSEN & WILLIAMS
1900 Washington Building
Seattle, Washington 93101

Counsel of Record for The Boeing Company

ARGUMENT

Respondent The Boeing Company ("Boeing") believes that Supreme Court review of this case is totally inappropriate and therefore feels that only the briefest of responses is necessary.

This case involves the *forum non conveniens* dismissal of wrongful death and personal injury claims brought by Canadian citizens to recover damages for deaths and injuries that occurred in the crash of a Canadian airline's flight in Canada when it attempted to land on a runway partially obstructed by snow-clearing equipment. The essential facts and procedural history of the case are set out in the Ninth Circuit and Central District of California opinions (Appendices A and C, respectively, of the Petition for Writ of Certiorari).[1]

Petitioners present three questions for review by this Court: the first two address the propriety of the conditions imposed by the District Court as part of the dismissal and the third question relates to the broad issue of whether or not the dismissal was proper under the principles laid down by this Court.

Boeing submits that the petition for writ of certiorari in this matter should not be granted for the following reasons:

1. This Court has just decided a case involving the applicability of the *forum non conveniens* doctrine. *Piper Aircraft Co.* v. *Reyno*, 50 U.S.L.W. 4055, December 8, 1981, *reh. denied*, January 25, 1982. In light of this recent reaffirmation of the basic *forum non conveniens* principles previously set forth in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), there are

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[1] Boeing disagrees with numerous aspects of petitioners' statement of the case as well as factual information included in the petition's argument section. For example, petitioners state that "no actual proof of [the Canadian airline's agreement to not contest liability] was offered and, as might be expected, settlement and damage trials for the petitioners have not occurred." Petition, pp. 12-13. In fact, evidence of the airline's agreement was before the District Court (Excerpt of record at 111). Furthermore, as the footnote in the Ninth Circuit's opinion makes clear, nearly all of the appellants in the Ninth Circuit had settled prior to the appellate hearing. Indeed, Boeing has been advised by the attorney for the airline that the petitioner in this case, Stuart Miskow, has now settled. However, Boeing does not feel that a full response to the numerous inaccuracies in the petition is warranted unless and until the petition is granted.

no "special and important reasons" for this Court to again take up this issue only a few months later. Thus, petitioners have no basis for contending that the instant case, in the language of Rule 17.1(c), involves "an important question of federal law which has not been, but should be, settled by this Court."

2. The Ninth Circuit's analysis of the various *forum non conveniens* factors is entirely consistent with the principles announced by this Court in *Gulf Oil* and again in *Reyno*. Thus, it can hardly be said that the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a).

3. This case involves the application of well-established legal principles to the particular facts of this accident. This Court's time is surely better spent on cases from which broad principles will emerge.

4. There was no dissenting opinion in the Ninth Circuit. All of the federal judges who have considered this case have been unanimous in their opinion that the matter should more appropriately be litigated in Canada. Indeed, many of the same claimants first attempted to gain access to the California state court system, and the state judges were also unanimous in favoring *forum non conveniens* dismissal. *Hemmelgarn* v. *Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980).

5. The instant case is on its facts an even clearer case for *forum non conveniens* dismissal than *Reyno*. In *Reyno*, liability would be an issue in any subsequent trial in the foreign jurisdiction, and the fact that the applicable law might be less favorable to the claimants was a factor weighing against dismissal. In the present case the Canadian airline agreed early on that it would not contest liability. Thus, the potential of a less advantageous liability law is not a factor herein.

6. Petitioners' first two "questions presented" are ironic in that they take issue with a condition to the dismissal that was designed for their own protection. The District Court imposed condition "c" (see Petition, pp. A-17 and A-18) to assure that the claimants could avail themselves of the airline's offer to either settle or go to trial on the issue of damages only without

contesting liability.[2] Furthermore, condition "c" does not force petitioners to accept the airline's offer. If for some reason the claimants feel that they would be better off proving a liability case against one or more defendants, they could do so. Condition "c" merely assures that the airline's offer is available should the claimants want to take advantage of it.

For all of the above reasons, Boeing submits that the petition for writ of certiorari is without merit and should be denied.

Dated: February 24, 1982.

Respectfully submitted,

Thomas J. McLaughlin

Counsel of Record for
The Boeing Company

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[2] The airline's offer to not contest liability was contingent upon the claimants agreeing that the settlement or judgment would be a complete resolution of all claims against all parties. The airline then could, and in fact did, seek contribution from other potentially culpable parties. Petitioner's second "question presented" erroneously assumes that this "full discharge" condition is a condition to the dismissal. It is not. It is a condition to the airline's offer.

Opposition

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No. 81-1390

IN THE

Supreme Court of the United States

October Term, 1981

STUART MISKOW, *et al.*,

Petitioners,

vs.

THE BOEING COMPANY, ROHR INDUSTRIES, INC., and THE McDONNELL DOUGLAS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ROBERT FORGNONE, Esq.,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Counsel of Record for Respondent, Rohr Industries, Inc.

JAMES M. FITZSIMMONS,
MENDES & MOUNT,
3 Park Avenue,
New York City, New York 10016,

GREGORY G. HOLLOWS,
GIBSON, DUNN & CRUTCHER,
of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

In addition to the questions presented by Petitioners, one further question arises from the Petition for Writ of Certiorari:

> Whether Petitioners may contend that it was an abuse of discretion for the District Court to condition its *forum non conveniens* dismissal as set forth in questions (1) and (2) of the Petition, when Petitioners did not raise those issues in the Court of Appeals below?

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No. 81-1390

IN THE

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October Term, 1981

STUART MISKOW, *et al.*,

Petitioners,

vs.

THE BOEING COMPANY, ROHR INDUSTRIES, INC., and THE McDONNELL DOUGLAS CORPORATION,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners, plaintiffs in the District Court and Appellants in the Court of Appeals for the Ninth Circuit, have petitioned this Court for the issuance of its writ of certiorari so as to permit review by this Court of the Ninth Circuit's determination to affirm the District Court's conditional dismissal of plaintiffs' actions on grounds of *forum non conveniens*. Defendant and Appellee below, Rohr Industries, Inc. submits that for each and all of the following reasons this Court should decline to issue its writ.

Statement of the Case.

Respondent, Rohr Industries, Inc. [hereinafter "Rohr"] will not repeat at length herein the facts of the accident themselves which were adequately reported by the District

Court and the Ninth Circuit.[1] Suffice it to say that Petitioners' account of the accident understates the circumstances.[2] Every investigatory body, and court which has reviewed this accident analyzed the probable cause for this crash, involving citizens of Canada only, as an interweaving of the actions of PWA (the airliner at issue), Calgary Air Traffic Control, Cranbrook Aeradio and the Boeing design of the thrust reverser system for its 737 model aircraft.[3]

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[1]See also *Hemmelgarn, et al. v. Boeing Company, et al.*, 106 Cal.App.3d 576, 165 Cal.Rptr. 190 (1980), which was the state court "companion" case to the federal action.

[2]The go-around maneuver referred to by Petitioners as being not difficult understates the complexity of that maneuver given the circumstances which faced the pilot, and Petitioners have skewed the facts in order to give the appearance that the snow sweeper on the runway presented no real problem to the pilot. Upon touchdown, a "squat switch" in the main landing gear of the Boeing 737 senses that the aircraft is on the ground. Hydraulic pressure is then allowed to deploy the thrust reversers at the command of the pilot. When the aircraft lifts off, the squat switch is activated and hydraulic pressure to the thrust reversers is shut off. [E.R. 76] Boeing also designed this aircraft so that when the thrust reverser was *fully* deployed, the main throttle (allowing forward thrust) could not be activated. [E.R. 348] Thus, the Boeing 737 pilots were warned in their operations manual not to attempt a go-around after reverse thrust had been initiated. [E.R. 76].

On February 11, 1978, Flight 314 touched down when the pilot, apparently deployed the thrust reversers without knowledge that snow removal equipment was still on the runway. When the pilot did notice the equipment, he attempted to retract the thrust reversers, add forward thrust power and lift off. [E.R. 88] However, when Flight 314 lifted off the ground, the thrust reversers had not been fully retracted. [E.R. 88] The squat switch, sensing that the plane was off the ground, shut off hydraulic power to the *nearly* stowed thrust reverser. [E.R. 76] The left thrust reverser caught the air current and was forced to the fully deployed position, thereby shutting off forward thrust power to the left engine. [E.R. 297-298] The plane continued to gain altitude on the one engine when suddenly the plane rolled left and crashed. [E.R. 261-262].

[3]See the District Court Opinion attached as Appendix A to the Petition and the references within that opinion to the Canadian investigatory entities, the Ninth Circuit Opinion attached as Appendix B to the Petition, and *Hemmelgarn v. Boeing, et al.*, 106 Cal.App.3d 576, 165 Cal.Rptr. 190 (1980).

During the proceedings in the District Court, "actual proof" as that term is defined by Federal law, was provided to the District Court evidencing the agreement that PWA would not contest liability, but settle or go to trial on the issue of damages alone, with respect to all plaintiffs. [E.R. 92-98] It was agreed between PWA, Boeing and the Canadian government that the appropriate apportioning of the settlements and damage awards would be adjudicated at a later time. Rohr was not a party to this agreement because it was conceded by Boeing in the District Court that, if there was a defect in the thrust reverser system, it was a Boeing induced defect due to the fact that the system, which would permit inadvertent spoiler deployment, was designed by Boeing engineers. [E.R. 76] Rohr has agreed to waive jurisdiction and statute of limitations defenses as a condition for its dismissal *forum non conveniens*. Petitioners contend that Rohr, is unduly favored by the PWA arrangement discussed above, but it is highly doubtful that the Canadian citizens are concerned with which defendant pays the damage awards to them in Canada.

As of the writing of the Ninth Circuit's Opinion, all but five of the original plaintiffs (twenty) in the Federal Court action had settled pursuant to the PWA agreement, and had their California federal actions dismissed. While Petitioners' cases have not settled, it is apparent that Petitioners do not want them settled, at least until a final determination is made concerning their California federal actions.

ARGUMENT.

I.

Questions (1) and (2) Presented by Petitioners for Review by This Court Were Not Raised in the Court of Appeals Below.

Petitioners state, at Page 8 of the Petition:

> "It [the Ninth Circuit Court of Appeals] also decline to consider the questions pertaining to the power of the trial court to impose the conditions it did as a part of its dismissal. Appendix A."

It comes as no surprise that the Ninth Circuit did not review the conditions for dismissal ordered by the District Court since Petitioners did not raise this issue on appeal.[4] The appellant's brief in the Ninth Circuit has been exhaustively scrutinized, and the first two questions presented to this Court for review are not expressly stated or fairly implied from that brief. Petitioners herein filed no reply brief in the Ninth Circuit, and the issue was not raised at all during oral argument.

Nor would it be logical to assume that Petitioners would have been aggrieved by the trial court's conditions in the first instance. These conditions actually made it easier for

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[4]The initial two questions presented by Petitioners in their Petition for Writ of Certiorari are as follows:

> "(1) Whether, in a products liability action brought by foreign plaintiffs against American corporate defendants, it is an abuse of discretion for a federal trial court to dismiss the action on the grounds of *forum non conveniens* on the condition that another corporate entity (not before or subject to the trial court's jurisdiction) go to trial promptly in a foreign jurisdiction on the issue of damages without contesting liability?
>
> (2) Whether, in such an action, it is an abuse of discretion to condition a *forum non conveniens* dismissal on acceptance of a foreign judgment against a foreign corporate entity (not before or subject to the trial court's jurisdiction) as full discharge of all persons' liability to the Petitioners?"

Petitioners herein to recommence their action in California should the required conditions not be fulfilled in Canada. Litigating in California is exactly what Petitioners have desired from the start, and it would have been foolhardy to have raised the District Court's conditions as an issue in the Ninth Circuit. However, having had the Ninth Circuit reject their legal "choice of law" arguments, much as this court rejected them in *Piper Aircraft Co. v. Reyno*, 50 L.W. 4055 (1981), Petitioners really had no issue upon which to make a further appeal. It is only now that Petitioners believe that the District Court went too far in favor of Petitioners when it conditioned the *forum non conveniens* dismissal on the basis that the Canadian plaintiffs (including Petitioners) be able to have a damages only trial in Canada which would constitute a full judgment against everyone concerned.

The United States Supreme Court will not review issues not presented in the Court of Appeals below unless there are *exceptional* circumstances which excuse Petitioners from having raised the issues previously.

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the Court below. *Lawn v. United States*, 355 U.S. 339, 362 (Fn.16) (1958).

See also *California v. Taylor*, 353 U.S. 553, 557 (Fn.2) (1957).

Petitioners have brought no circumstances to the attention of this Court which would qualify as an "exceptional circumstance." Indeed, Petitioners do not even attempt to explain to this Court their raising of issues not briefed or argued to the Court of Appeals below.

II.

Petitioners' Assertion That the Trial Court May Not, in a Forum Non Conveniens Determination, Impose Conditions in Addition to the Traditional Waiver of Jurisdiction and Statute of Limitations Defenses Is Without Basis in Law or Fact.

Petitioners somewhat surprisingly claim that, in conditioning a defendants' dismissal on a *forum non conveniens* determination, the Trial Court may not order *defendants* to comply with additional conditions (more than a waiver of the statute of limitations and jurisdictional defenses), *even when these additional conditions would benefit Petitioners herein;* that Petitioners cannot be deprived of their right to a liability trial in the transferee forum (Canada) by the extra condition of a third party's stipulation to liability. Such logic is akin to saying that a defendant may not deprive a plaintiff of his chance to prevail at trial by stipulating to liability prior to that time. Petitioners herein seemingly argue against their own best interest.

The case law contains examples wherein courts have imposed "additional" conditions on defendants when determining to dismiss *forum non conveniens:*

> "Judge Hart conditioned the dismissals on the stipulations made by UTC which were to apply if suit were later brought in Norway or in the *Pain, Christophersen,* and *Sibthorpe* cases, in France, Canada, and the United Kingdom, respectively. UTC stipulated its consent to personal jurisdiction in the foreign court where plaintiffs might subsequently bring suit, agreed to waive any defense of statute of limitations were such a suit brought more than one year from the date of dismissal, *and most significantly, agreed to proceed directly to trial only on the issue of damages, without contesting liability, in any suit filed by plaintiffs outside the United*

> *States.*" *Pain v. United Technologies*, 637 F.2d 775, 780 (D.C. Cir. 1980) (emphasis added) [affirming the trial court's dismissal].

Petitioners further assert to this Court that the conditions imposed by the District Court on *defendants* were in error since one of the conditions reference the acts of a third party, i.e., that PWA, which was not before the District Court, would either settle or stipulate to liability in a damages trial. Importantly, the District Court, by conditioning *defendants'* dismissal, was not imposing any order on PWA; rather, the District Court stated that if a certain event did not take place, the District Court's reserved jurisdiction would enable Petitioners to recommence their action in California, something which Petitioners have desired from the start. By imposing additional conditions on *defendants*, the District Court was making it easier for Petitioners to recommence their action in California. The matter is not up for "grabs," nor is the District Court without power to remedy the situation if the imposed conditions subsequent fail to take place.

In footnote 8 of the Petition, counsel goes outside the record of this case and hints that the District Court's condition at issue here is not being satisfied in that "[a]pparently the issue of liability has crept back into the Canadian proceedings, . . ." Aside from the falseness of this conclusion, Petitioners, if they have any facts to support their conclusion, should present them to the District Court which has reserved jurisdiction. The Supreme Court is in no position to make a factual finding on this out-of-the-record, unsupported statement. Indeed, the record of settlements in this case, as documented in the Ninth Circuit's Opinion (Appendix A attached to the Petition at page 3 (Fn.1)), certainly contradicts Petitioners' conclusion.

Finally, in attacking the conditions imposed upon defendants by the District Court, Petitioners claim that the District Court had no power to order that any judgment on damages entered against PWA would discharge and satisfy Petitioners' claims against any defendant. While stated as a "condition," the District Court's statement herein is merely a reflection of the law applicable in common law jurisdictions generally. There is no common law jurisdiction to Rohr's knowledge that would allow a plaintiff to be awarded full judgment against one defendant, and at the same time have the opportunity to seek a full judgment against a defendant not present in the first action, against a defendant not present in the second action, and so forth. See e.g., *Fletcher v. California Portland Cement Company*, 99 Cal.App.3d 97, 159 Cal.Rptr. 915 (1979). Thus, the District Court's "condition" which is characterized by Petitioners as a sweeping departure from former precedent has been a fixture in the common law for centuries.

III.

The Trial Court Did Not Abuse Its Discretion in Ordering This Action Conditionally Dismissed Forum Non Conveniens [Question No. 3].

The Petitioners make no serious attempt to demonstrate an abuse of discretion concerning the District Court's analysis of the forum non conveniens factors as stated in *Gulf Oil Corp. v. Gilbert*, 300 U.S. 501 (1947), but rather conclude that the District Court skewed the *Gilbert* analysis in favor of defendants by simply rejecting all claims of product liability, and that the Ninth Circuit failed to agree with Petitioners' arguments. While the opinions of both courts below clearly show that the District Court made no such determination, Petitioners' argument blindly ignores the fact that application of Canadian liability and discovery law is

irrelevant. What difference does it make if the provincial law of British Columbia does not recognize strict liability in tort? There is a stipulation as to liability. Application of no liability law will be required. What difference does it make if Canada doesn't have discovery rules to Petitioners' liking? There will be nothing to discover regarding the product at issue since Petitioners will not be compelled to prove liability.

Aside from the fact that Petitioners' argument regarding abuse of discretion is not relevant, it cannot possibly be said that the Court below abused its discretion. The Courts below carefully weighed the factors for analysis given in *Gulf Oil Corp. v. Gilbert, supra*. All decedents in this action were Canadian residents; the aircraft which crashed was Canadian-owned and registered; the accident took place on Canadian soil; the primary defendants in any action brought to recover damages for wrongful death are Canadian. Since the accident took place in Canada, and the primary defendants are Canadian, a great bulk of evidence is found in Canada. The District Court has no way of compelling attendance of precipient Canadian witnesses for a litigation in California. Furthermore, none of the Canadian defendants would be subject to the jurisdiction of a California Court. Plaintiffs who have filed in Canada, as well as California, would be splitting their cause of action.

Neither did the Courts below abuse their discretion in determining that Rohr and McDonnell Douglas were defendants named only for the purposes of securing California as plaintiffs' forum. The Courts below came to their conclusions not in determining whether a triable issue of fact as to Rohr or McDonnell Douglas existed (as a court would on summary judgment), but rather for purposes of *forum non conveniens*, it found that Rohr and McDonnell Douglas did not appear to be significantly involved in the cause of

this accident. The trial court's "finding" was only concerned with the proper forum for bringing such an action.

Were a court not able to analyze the underlying factual circumstances upon which a *forum non conveniens* motion is brought, a plaintiff's irresponsible allegations concerning the propriety of a forum would always defeat any *forum non conveniens* motion. The Federal Courts do not operate in such a manner. *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499 (2d Cir. 1966).

As noted by all Courts, actions are pending in British Columbia, Canada, against PWA, the City of Cranbrook, and the Canadian government. None of these parties are subject to jurisdiction in California. Moreover, all defendants in the present action have stated that they will submit to the jurisdiction of British Columbia. In determining the proper forum, a major factor to be considered is whether all parties can be brought before the court:

> "It is undisputed that defendants would have claims over against the owners of the Paracas and Trinity House, presently parties to the suits in England, for any recovery which plaintiffs may secure in those actions. It is also undisputed that these third parties are beyond the jurisdiction of the United States District Court. The inability to impede other parties directly involved in the controversy is a factor which weighs against retention of jurisdiction in the Southern District of New York." *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975).

The point here is obvious and does not require great discussion. Defendants have the right to have this litigation resolved with *all* responsible parties present and amenable to suit. Petitioners have no right to seek damages in California from only *some* of the alleged tort feasors, when Petitioners' cause of action can be litigated against, or settled

with, all alleged tort feasors present in Canada. Neither is it proper that Petitioners seek a double recovery, one in California and one in Canada. Defendants should not have to suffer such injustice because non-residents wish to pursue an action in California.

IV.
Conclusion.

It is respectfully submitted that the Petition for Writ of Certiorari filed byPetitioners should be denied.

DATED: February 19, 1982.

Respectfully submitted,

ROBERT FORGNONE,
GIBSON, DUNN & CRUTCHER,
Counsel for Respondent,
Rohr Industries, Inc.